ORAL ARGUMENT NOT YET SCHEDULED

No. 06-5092

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORANNA BUMGARNER FELTER, *et al.*,

Plaintiffs - Appellants,

v.

DIRK KEMPTHORNE, *et al.*,

Defendants - Appellees.

On Appeal from the United States District Court for the District of Columbia
Case No. 02-2156 (RWR)

BRIEF OF THE APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and amici: A list of plaintiffs appearing before the district court (appellants in this court) immediately follows this certificate. Defendants appearing before the district court were Gale A. Norton, former Secretary of the Interior; Aurene M. Martin, former Acting Assistant Secretary of the Interior for Indian Affairs; Neal McCaleb, former Assistant Secretary of the Interior for Indian Affairs; Wayne Nordwall, former Regional Director of the Bureau of Indian Affairs, southwest region; Chester Mills, Superintendent of the Bureau of Indian Affairs, Uinta and Ouray Agency; and the United States of America.

The following individuals are appellees in this court pursuant to Fed. R. App. P. 43(c)(2) (automatic substitution of officeholder): Dirk Kempthorne, Secretary of the Interior (for Gale A. Norton); Michael Olsen, Acting Principal Deputy Assistant Secretary Indian Affairs (for Aurene M. Martin); William Patrick Ragsdale, Director, Bureau of Indian Affairs (for Neal McCaleb); and Allen Anspach, Regional Director of the Bureau of Indian Affairs, southwest region (for Wayne Nordwall). Chester Mills and the United States of America are also appellees in this court.

B. Rulings Under Review: The ruling under review is *Felter v. Norton*, 412 F. Supp. 2d 118 (D.D.C. 2006) (Roberts, J.). The district court's opinion is

reproduced at Appendix 7-23.

C. Related Cases: Other than the U.S. District Court for the District of Columbia, which issued the ruling under review, the case on review was not previously before this Court or any other court. Counsel for the appellees is aware of no related cases.

Respectfully submitted,

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GLOSSARY

AC	amended complaint
APA	Administrative Procedure Act
App.	appellants' appendix
Br.	appellants' opening brief
SA	appellees' supplemental appendix
UPA	Ute Partition and Termination Act

STATEMENT OF JURISDICTION

The jurisdiction of the district court was invoked under, *inter alia*, 28 U.S.C. § 1331 and 5 U.S.C. § 701 *et seq.* The district court entered a final judgment on January 27, 2006, disposing of all claims as to all parties. Appendix (App.) 6. A notice of appeal was timely filed on March 24, 2006. App. 5 (docket entry #36). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in an addendum to this brief.

STATEMENT OF THE ISSUE

Whether the district court correctly held that appellants' amended complaint is barred by the six-year statute of limitations in 28 U.S.C. § 2401(a).

STATEMENT OF THE CASE

I. Nature of the case. On November 4, 2002, plaintiffs (hereafter referred to collectively as "Felter") filed a complaint against the Secretary of the Interior and other federal officials. App. 1 (docket entry #1). An amended complaint was filed on January 27, 2003. App. 1 (docket entry #5). Invoking the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, Felter challenged the actions of federal officials "in connection with the purported

termination of the Indian status of the indigenous people of the Uinta Band" under the Ute Partition and Termination Act (UPA), 25 U.S.C. § 677 *et seq.* Amended Complaint (AC) ¶ 8; Supplemental Appendix (SA) 3. On May 20, 2003, the defendants filed a motion to dismiss. App. 2 (docket entry #14). On January 27, 2006, the district court granted that motion. App. 6; *Felter v. Norton*, 412 F. Supp. 2d 118 (D.D.C. 2006).

II. Statutory framework.

A. Ute Partition and Termination Act. Enacted in 1954, the Ute Partition and Termination Act (UPA), 25 U.S.C. § 677 *et seq.*, provides for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between "mixed-blood" and "full-blood" members, and for the termination of federal supervision over property of the "mixed-blood" members of that tribe. 25 U.S.C. § 677. The UPA provides for publication in the Federal Register of a roll of "mixed-blood" and "full-blood" members living on August 27, 1954. *Id.* § 677g. The Secretary of the Interior published final membership rolls in the Federal Register on April 5, 1956. 21 Fed. Reg. 2208 (Apr. 5, 1956). The final rolls listed 490 "mixed-blood" members and 1,314 "full-blood" members. *Id.*

Effective on the publication of the final rolls, the UPA provides that "the

tribe shall thereafter consist exclusively of full-blood members," and "[m]ixed-blood members shall have no interest therein." 25 U.S.C. § 677d. Within 60 days after the publication of the final membership rolls, the tribal business committee representing the full-blood group and the authorized representatives of the mixed-blood group were to commence a division of the assets of the tribe that were then "susceptible to equitable and practical distribution." *Id.* § 677i. Division of tribal assets was to be based upon "the relative number of persons comprising the final membership roll of each group." *Id.*

Upon removal of federal restrictions on the property of the "mixed-blood" members (*see id.* § 677o(a)), the Secretary of the Interior is to publish in the Federal Register "a proclamation declaring that the Federal trust relationship to such individual[s] is terminated." *Id.* § 677v. After publication of that proclamation, "such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian." *Id.* The Secretary of the Interior published the required termination proclamation in the Federal Register on August 26, 1961. 26 Fed. Reg. 8042 (Aug. 26, 1961).

B. 28 U.S.C. § 2401(a).

Section 2401(a) of Title 28 provides, in relevant part: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

III. Statement of facts.[1] In 1861, President Lincoln declared the Uinta Valley an Indian reservation. AC ¶ 27; SA 6. The reservation included the entire valley of the Uinta River within Utah Territory. AC ¶ 28; SA 6.[2] By 1869, the Uinta Band of Utes (Uinta Band) had been forced to relocate to this reservation, which became known as the "Uinta and Ouray Reservation" (Reservation). AC ¶ 27; SA 6. In 1881, the White River Band of Utes from western Colorado moved to the Reservation under a removal agreement with the United States. AC ¶ 29; SA 6. Between 1897 and 1902, Reservation land was allotted to the Uncompaghre Band from Colorado. AC ¶ 30; SA 7.

The "Ute Indian Tribe," comprised of the Uinta, White River, and Uncompaghre Bands, came into existence in 1937 pursuant to the adoption of a

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[1] The facts in this section are drawn from the allegations of the amended complaint, which are assumed for present purposes to be true. *See Wagener v. SBC Pension Benefit Plan – Non Bargained Program*, 407 F.3d 395, 397 (D.C. Cir. 2005).

[2] The Uinta River is now called the Duchesne River.

constitution and bylaws under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.* AC ¶ 33; SA 7-8. In the early 1950s, the "Confederated Bands of Colorado Utes" (Confederated Bands) obtained a $32 million judgment from the Indian Claims Commission. The White River and Uncompaghre Bands were to share in this judgment. AC ¶ 37; SA 9. In the early 1950s, the Uinta Band filed a claim for compensation with the Indian Claims Commission. AC ¶ 38; SA 9.

In June 1950, a resolution of the Ute Indian Tribe known as the "share and share alike agreement" was adopted. Through this agreement, the Uinta Band acquired the right to share in the Confederated Bands' $32 million Indian Claims Commission judgment for lands relinquished by the Uinta Band in connection with a separate Indian Claims Commission action against the United States. AC ¶ 39; SA 9-10. In effect, the Uinta Band acquired the right to share in the Colorado judgment funds because of the Uinta Band's agreement to release 130,000 acres of lands claimed in its separate Indian Claims Commission action. AC ¶ 39; SA 9-10. In August 1951, Congress enacted legislation that affirmed the "share and share alike" agreement. AC ¶ 53; SA 13-14.

On March 31, 1954, the General Council of the Ute Indian Tribe convened to vote on the "termination" of the "mixed-blood" members of the Uinta Band. AC ¶ 46; SA 11-12. The General Council voted to separate the assets of the Ute

Indian Tribe between mixed-blood Utes, predominately members of the Uinta Band, and full-blood Utes. AC ¶ 47; SA 12. The amended complaint alleges that the General Council's actions were not in conformity with the constitution and bylaws of the Ute Indian Tribe. AC ¶ 46; SA 11-12.

Based on the March 31, 1954 General Council vote, Congress passed the UPA. AC ¶ 48; SA 12. On August 26, 1961, the Secretary of the Interior published in the Federal Register a proclamation terminating supervision over the affairs of the "mixed-bloods" and terminating their status as federally recognized Indians. 26 Fed. Reg. 8042 (Aug. 26, 1961). *See* AC ¶ 58; SA 15. As a result of the termination, the 490 mixed-blood members of the Uinta Band lost any share of the $32 million Indian Claims Commission judgment. AC ¶ 53; SA 13-14.

IV. The district court's decision. Plaintiffs are "mixed-blood" Utes whose federally recognized Indian status was terminated, their descendants, and deceased members of that group (and their descendants). AC ¶¶ 16-17; SA 4-5. Plaintiffs filed a complaint in November 2002 seeking relief for alleged losses suffered as a result of the wrongful termination of their status as recognized members of the Ute Tribe. The district court concluded that, although "[p]laintiffs allege that they have suffered as a result of the wrongful termination of their status as recognized members of the Ute Tribe," the complaint "does not allege any acts

that the defendants committed within the six-year statute of limitations period" in 28 U.S.C. § 2401(a). App. 22. The court explained (App. 18):

> Here, plaintiffs' injuries stem directly from the termination of their status as recognized Ute Indians and the disbursement of their Reservation assets. Plaintiffs' cause of action first accrued when their status as recognized Indians was terminated and when the Reservation's assets were distributed. According to the pleadings, plaintiffs' terminated status occurred with the passage of the UPA in 1954. Even assuming that plaintiffs' claim did not accrue until the most recent act alleged in their complaint – the publication in the 1961 Federal Register of the list of terminated members (*see* Am. Compl. ¶ 14) – the six-year statute of limitations expired before plaintiffs filed this action.

In so ruling, the district court also found that the amended complaint was not timely filed under either the "continuing violations" doctrine or principles of equitable tolling. App. 19-22. The court explained that the continuing violations doctrine "cannot apply to exempt plaintiffs from the statute of limitations period because plaintiffs fail to allege that defendants committed any wrongful acts during the limitations period prior to this action being filed." App. 20. The court likewise observed that "Plaintiffs' complaint does not include factual assertions which would warrant application of the equitable tolling doctrine," noting in particular that "[p]laintiffs have not presented any reason clarifying why they have not filed this claim earlier," and that "[n]o extraordinary

circumstances beyond plaintiffs' control are alleged." App. 22. Accordingly, the court dismissed the amended complaint. App. 23.

SUMMARY OF ARGUMENT

Felter did not file her complaint until 2002. That date is well outside the six-year statute of limitations in 28 U.S.C. § 2401(a), whether measured from the enactment of the UPA (1954) or the formal termination of the federally recognized status of the "mixed-bloods" (1961). Neither the "continuing violation" doctrine nor equitable tolling applies in the circumstances of this case.

Although Felter now asserts that her claim for an accounting is timely under Public Law 108-108, 117 Stat. 1241 (Nov. 10, 2003), she did not raise that contention in the district court and therefore has not properly preserved it for review on appeal. In any event, that accrual provision does not apply to a wrongful termination claim, such as this, but only to claims concerning loss or mismanagement of trust funds currently held by the United States. For these reasons, the judgment of the district court should be affirmed.

STANDARD OF REVIEW

This Court reviews *de novo* a district court order granting a motion to dismiss. *Rochon v. Gonzales*, 438 F.3d 1211, 1216 (D.C. Cir. 2006).

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE AMENDED COMPLAINT ON STATUTE OF LIMITATIONS GROUNDS.

A. Felter's own characterization of her complaint demonstrates that it was not timely filed. As Felter explains, "[t]he dispute that led to this lawsuit began in and around August 21, 1951 when an arrangement called the 'share and share alike' agreement was enacted by Congress granting to Appellants a legal right to share in a $32,000,000 Indian Claims Commission settlement." Br. 9. Felter emphasizes that "Appellants' right to the $32,000,000 Claims Commission settlement vested *three years before the enactment of the UPA and at a time when Appellants were federally-recognized Indians.*" *Id.* (emphasis in original). The "gravamen of Appellants' Complaint is that they lost valuable property and other rights *vested* in federal 'wards,' the Uintas, before the enactment of the UPA and there has never been an accounting to this day." Br. 17 (emphasis in original). *See id.* (referring to the loss of $32,000,000 "so it could not be used by the terminated Uintas").

Felter's characterization of her claim makes clear that it was untimely filed. By their own reckoning, the right of the "mixed-bloods" to share in the $32 million Indian Claims Commission judgment vested in 1951, and that vested right

was allegedly improperly cut off by the enactment of the UPA in 1954 and the formal termination of the status of the "mixed-bloods" as federally recognized Indians in 1961: Yet the "mixed-bloods" did not bring the instant action for an accounting with respect to the $32 million judgment until 2002. That date is well outside the six-year statute of limitations in 28 U.S.C. § 2401(a), whether measured from the enactment of the UPA (1954) or the formal termination of the federally recognized status of the "mixed-bloods" (1961). *See generally Block v. North Dakota*, 461 U.S. 273, 287 (1983) (explaining that a statute of limitations "constitutes a condition on the waiver of sovereign immunity").

B. The "continuing violation" doctrine does not apply because Felter failed to allege the commission of any wrongful act during the limitations period prior to the filing of the complaint. The "continuing violation" doctrine may be applicable when a claim alleges that a wrongful act occurred during the statute of limitations period but also includes other wrongful acts that occurred outside the statute of limitations. When courts apply this doctrine, the claim will not be barred provided that at least one wrongful act occurred during the statute of limitations period and that it was committed in furtherance of a continuing wrongful act or policy or is directly related to a similar wrongful act committed outside the statute of limitations period. *See Lightfoot v. Union Carbide Corp.*,

110 F.3d 898, 907 (2d Cir. 1997). The continuing violations occurring within the statute of limitations period must be actual acts committed, rather than merely effects of prior acts. *See Guerra v. Cuomo*, 176 F.3d 547, 551 (D.C. Cir. 1999) (finding a complaint premised on an employer's failure to accommodate an employee's disability presented not continuing violations of the statute but rather "what amounts to continuing effects of past discriminatory acts") (internal quotations omitted); *Dasgupta v. Univ. of Wisc. Bd. of Regents*, 121 F.3d 1138, 1140 (7th Cir. 1997) (concluding that "[a] lingering effect of an unlawful act is not itself an unlawful act"); *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991) (finding that defendant's refusal to allow plaintiffs to join a retirement plan occurred outside the limitations period and that the daily lack of participation in the plan is an effect of past discrimination, not an act occurring within the limitations period).

Here, as the district court correctly concluded (App. 20), the continuing violation doctrine is inapplicable because Felter does not allege that the defendants committed any wrongful acts during the limitations period prior to the filing of this action. Rather than alleging wrongful acts committed by the defendants during the six-year period prior to November 2002, Felter seeks redress for harm suffered as a result of the termination of the "mixed-bloods'" federally

recognized Indian status, which occurred in 1961. *E.g.*, AC ¶¶ 65-68; SA 17-18. As the district court properly found (App. 21), "[d]efendants' continual failure to recognize plaintiffs' possible status as members of the Ute Tribe does not amount to contemporary wrongful acts."

Felter is incorrect in arguing (Br. 18) that the "continuing violation" doctrine applies here because, were the "mixed-bloods" still considered members of the Ute Tribe, the United States currently would owe them an accounting. Such is not a claim for an accounting; rather, it is a claim that the federally recognized Indian status of the "mixed-bloods" was improperly terminated – which occurred in 1961, well outside the statute of limitations period. The gravamen of Felter's claim is that the trust relationship between the "mixed-bloods" and the federal government was improperly terminated long ago. Any alleged failure to provide a current accounting would be only an effect of that alleged prior unlawful action.

C. Equitable tolling does not apply because Felter alleged no "extraordinary circumstances" justifying the untimely filing of the complaint.

The running of the statute of limitations may be equitably tolled where a plaintiff demonstrates "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1814 (2005); *see Young v. United States*, 535 U.S. 43, 50 (2002).

Extraordinary circumstances are those beyond the plaintiff's control which make it impossible to file a complaint within the statute of limitations period. *United States v. Cicero*, 214 F.3d 199, 203 (D.C. Cir. 2000). Here, the district court properly concluded (App. 22) that "Plaintiffs have not presented any reason clarifying why they have not filed this claim earlier. * * * * No extraordinary circumstances beyond plaintiffs' control are alleged."

Felter is mistaken in contending (Br. 19) that the record "does not support the court's conclusion" that the amended complaint lacks allegations amounting to extraordinary circumstances. In support of that contention, Felter cites an allegation that "[p]rior to the purported termination of the special trust relationship with each of the 490 Mixed-bloods listed on the published proclamation, the defendant BIA [Bureau of Indian Affairs] was obligated to disclose any plans, secret or otherwise, to terminate the individual mixed-blood members of the Uinta Band that would result in their exclusion from obtaining any share of the $32 million judgment." AC ¶ 61; SA 15-16. But Felter does not offer an explanation how that allegation constitutes circumstances beyond the "mixed-bloods'" control which made it impossible to file a timely complaint. Contrary to the implication of this allegation, nothing was kept hidden from the "mixed-bloods"; rather, implementing the UPA, the federal government published final membership rolls

of Uinta "mixed-bloods" and "full-bloods" in 1956, and terminated the trust relationship with the former group in 1961. Similarly, Felter cites (Br. 19) an allegation to the effect that the federal government "failed or refused to give the Uinta Band mixed-bloods accurate and adequate information so they could understand their rights and the obligations of the United States under the UPA." *See* AC ¶ 62; SA 16. Again, Felter does not explain how that bare allegation justifies delaying the filing of the instant suit for over 40 years.

D. Public Law 108-108 does not apply here. In this Court, Felter in effect acknowledges that the complaint was untimely filed, but places heavy reliance on a provision of Public Law 108-108, 117 Stat. 1241 (Nov. 10, 2003), in support of an argument that the statute of limitations on her claim for an accounting has not yet begun to run. *See* Br. 15, 17, 20, 21. However, Felter waived that claim by failing to raise it in the district court. Although, as Felter notes (Br. 15), Public Law 108-108 was enacted about one month after the "mixed-bloods" filed their opposition to the government's motion to dismiss, they did not supplement their opposition to assert a claim based on the new enactment during the two-plus years between the enactment of Public Law 108-108 in November 2003 and the issuance of the district court's decision in January 2006. "It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard

on appeal." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984). *See Hussain v. Nicholson*, 435 F.3d 359, 364 (D.C. Cir. 2006) (applying this principle). Felter has advanced no reason for departing from this general rule.

In any event, even if not waived, Felter's Public Law 108-108 claim lacks merit. Felter relies on a provision of Public Law 108-108 that states:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of enactment of this Act, concerning the losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 108-108, 117 Stat. 1263. By its terms, this provision addresses claims "concerning the losses to or mismanagement of trust funds." It plainly does not apply to revive a long-barred claim based on an alleged improper termination of federally recognized Indian status, which is the gravamen of Felter's suit.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing Brief of the Appellees is proportionately spaced, has a typeface of 14 points, was prepared using Corel WordPerfect 12, and contains 3,297 words.

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September 29, 2006

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief of the Appellees has been served upon counsel this 29th day of September, 2006, by first-class U.S. mail, postage prepaid, as follows:

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